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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 372.

THE UNITED STATES PRINTING AND LITHOGRAPHING COMPANY,
Petitioner,

vs.

GRIGGS, COOPER & COMPANY,
Respondent.

BRIEF OF RESPONDENT.

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Respondent.

BRIEF OF RESPONDENT.

STATEMENT OF FACTS.

A proper consideration of the issues requires that the statement of facts in petitioner's brief be somewhat enlarged.

The respondent, a Minnesota corporation, is engaged in the business of manufacturing and selling wholesale groceries and other like goods and merchandise in the States of Minnesota, Wisconsin, North and South Dakota, Montana and Washington. Its principal place of business is in the State of Minnesota.

The petitioner is an Ohio corporation engaged in printing, lithographing and selling labels to various persons, firms and corporations to be attached to their various products and for use in their various businesses (Record page 34).

The respondent and its predecessor from the year 1893 up to the present time has used continuously the trademark "Home Brand" upon its grocery products and the articles of merchandise manufactured and sold by it in the above territory. The trademark "Home Brand", covering various commodities manufactured and sold by said respondent, was from time to time registered in the United States Patent Office under the Acts of Congress. There are thirty-four such registrations covering practically all of the articles manufactured and sold by respondent (Record page 35).

The essential feature of respondent's trademark is the arbitrarily selected word "Home" which is associated with the word "Brand". The manner and form of using this trademark upon respondent's products is shown by respondent's labels (Record page 39). The petitioner was not actually engaged in the sale of products similar to those of respondent, but did print, lithograph and sell to its customers various labels which were printed in the State of Ohio and shipped by it to its customers in the States as shown by the stipulation between the parties (Record pages 45-47).

None of the petitioner's labels were sold by it to customers located in the States in which respondent carries on its business. Respondent's petition in the trial court alleges:

> "The labels containing or bearing the word 'Home' so printed, published and sold by the defendant as aforesaid are used by the purchasers from said defendant as a trademark or mark in the sale by them in the same territory in which plaintiff and its said predecessor established

their market and have long sold their said products, and said purchasers thereby sell goods, wares and merchandise in said territory of the same kinds respectively as those dealt in by plaintiff under said trademark and the labels so printed, published and sold by the defendant as aforesaid are as defendant well knew sufficiently similar to the plaintiff's said trademark 'Home Brand' as to lead to confusion and mistake in the minds of the public and purchasers and said acts of the defendants are knowingly done with the effect of enabling its purchasers by the use of such labels to substitute and palm off their goods, wares and merchandise of the plaintiff to the irreparable damage of the plaintiff for which it has no adequate remedy at law."

The answer of the petitioner in the trial court does not put in issue the above allegation. It therefore stands admitted. The respondent and its predecessor advertised its goods bearing the registered trademark extensively in the territory in which respondent was engaged in business and said respondent is still selling goods under said labels and has in said territory a large and substantial volume of sales of goods under said labels (Record page 48).

Respondent in its petition prayed for an injunction restraining and enjoining the petitioner from printing, publishing or selling labels for any kind of grocery commodities such as are being sold by the respondent under its trademark (Record page 42).

The case was tried by the Court of Common Pleas of Hamilton County, Ohio, and a formal order for judgment in favor of respondent was made and entered on April 7th, 1926. Outside of the formal order for judgment no separate and specific findings of fact were made by the trial court (Record pages 26-33).

Thereafter the matter came on for hearing and reargument before the Court of Appeals for Hamilton County, Ohio, wherein the decision of the trial court was affirmed (Record pages 18-25).

The Supreme Court of the State of Ohio issued a writ of error to the Court of Appeals of Hamilton County and the case was reviewed by the Supreme Court and the judgment of the Court of Appeals affirmed (Record pages 4-17). No formal, definite or specific findings of fact or bill of exceptions were before the Supreme Court of Ohio. No request for findings was ever made by petitioner. The case was tried and submitted in all courts upon the pleadings and the stipulation of the parties.

ARGUMENT.

The facts in this case are covered by the undenied averments of the petition, the admissions in the answer and the stipulation of the parties.

Respondent alleges in its petition that the labels printed and prepared by petitioner are used by petitioner's customers as a trademark in the sale by them of their goods and products of the same kind and character as respondent's goods in the same territory in which respondent transacts its business and has established its market. These allegations are material. The petitioner does not deny the same in its answer and it therefore stands admitted. The effect to be given the pleadings in this case is to be determined by the laws of the State of Ohio.

> Robertson v. Perkins, et al., 129 U. S. 233, 32 L. Ed. 686;
> Deputron v. Young, 134 U. S. 241, 33 L. Ed. 923.

In these cases it was decided that material allegations in the complaint, not denied by the answer, stand admitted.

In the case of

> Bomberger v. Turner, 13 Ohio St. 263,

the Court said,

> "In order to put plaintiff upon proof of a material averment in his petition, the defendant must, in some form, deny its truth. Hence, where the answer to such averment is merely 'these defendants do not admit, etc.', the plaintiff cannot be required to offer proof in regard to it."

The law is well stated as to the effect of the pleadings in Aleshire v. P. C. C. & St. L. Railroad Company, 25 Ohio N. P. N. S. 76, as follows:

"Under our practice and that of the common law, a specific denial of one or more allegations of a petition is held to be an admission of all others well pleaded; this conclusion essentially results from the rule that a specific denial to each allegation of a petition is a separate denial applicable only to the specific allegations controverted."

No findings of fact were made by the Court upon the facts admitted in the pleadings nor was such a finding necessary.

In

Fenske v. Nelson, 74 Minn. 1,

the Court said:

"Findings of Fact must be fairly construed with reference to the pleadings and the manifest intention of the trial court. It is not necessary to include in such findings facts admitted by the pleadings."

The rule seems to be settled by the authorities that it is not necessary for the Court to make findings as to matters admitted or not denied in the pleadings.

Goodyear Rubber Co. v. Eureka, 135 Cal. 613, 67 Pac. 1043;

Murphy v. Pacific Bank, 130 Cal. 542, 62 Pac. 1059;

Grossini v. Perazzo, 66 Cal. 545, 6 Pac. 450;

Roussin v. Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123;

Alderson v. Cutting, 163 Calif. 503; Anno. Cases 1914 A 1;

Allen v. Hollingshead, 155 Ind. 178, 57 N. E. 917;

Carlisle v. Mulhern, 19 Mo. 56;

State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311;

Anderson v. Alseth, 8 S. D. 240, 66 N. W. 320;

Peterson v. Johnson, 20 Wash. 497, 55 Pac. 932;

Hawkes v. Dodge County Mut. Ins. Co., 11 Wis. 188.

In

O'Reilly, et al. v. Campbell, et al., 116 U. S. 418, 29 L. Ed. 669,

Mr. Justice Field said:

> "But findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the Court notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Defects of form should be called to the attention of the trial court by the objecting party, and the requisite correction of the findings would seldom be denied."

Sec. 11470 Ohio General Code provides:

> "When questions of fact are tried by the court, its finding may be general for the plaintiff or defendant, unless, with a view of excepting to the court's decision upon questions of law involved in the trial, one of the parties, so requests, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

A general finding for plaintiff inferable from an order for judgment in his favor imports a finding of all subsidiary facts necessary to that conclusion.

Fisher v. Drew, 247 Mass. 178, 141 N. E. 875, 30 A. L. R. 798.

The record which went from the Court of Appeals to the Supreme Court of Ohio was without separate or specific findings of fact or bill of exceptions. Under the circumstances a presumption arises that the lower court had sufficient evidence before it to sustain the judgment.

Pure Oil Co. v. Kindall, 116 Ohio St. 123.

The respondent sold its products in Interstate Commerce throughout the territory covered by the stipulation of the parties. The petitioner printed and sold its labels bearing a mark which infringed upon the registered trademark of respondent and shipped such labels through the channels of Interstate Commerce to its various customers, whose names and addresses are covered by the stipulation of facts. The customers of the petitioner attached the infringing labels so printed and shipped by petitioner to their respective products of the same kind and nature as those sold by respondent and petitioner's customers shipped and sold their products in the territory throughout which respondent was engaged in business. This brings us to a consideration of the legal questions involved.

I

The Trademark Act of 1905.

Congress under the power vested in it by the Constitution to regulate Interstate Commerce on February 20th, 1905, enacted the "Trade-Mark Law" which is found in 33 Statutes at Large 724. This act by its express terms is made applicable to "commerce among the several states", whereas the Trade-Mark Act of 1881 covered only Trade-Marks used "in foreign commerce or commerce with Indian tribes". Sections 1 to 15 of the Act provide the machinery for registering a trade-mark used in commerce with foreign nations or among the several states or with Indian tribes. Section 16 of the Act makes the registration of a trade-mark under the provisions thereof prima facie evidence of ownership. It also provides that,

> "Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy or colorably imitate such trade-mark and affix the same to merchandise

of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration and shall use or shall have used such reproduction, counterfeit, copy or colorable imitation in commerce among the several states or with a foreign nation or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof."

Section 19 of the Act provides for the granting of injunctive relief to prevent the violation of any right of the owner of a trade-mark registered under the act. Section 19 of the Act provides:

"The several courts vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. The court shall have the same power to increase such damages, in its discretion, as is given by section sixteen of this Act for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed."

In

American Steel Foundries v. Robertson, 262 U. S. 209, 67 Fed. 953,

the Hon. the Chief Justice said:

> "It is obvious from that Section (Section 9) and the whole of the trade-mark act that Congress intended to produce a parallelism in the mode of securing these two kinds of Government monopoly from the Patent Office."

In

Le Blume Import Co. v. Coty, 2 Circuit, 293 Fed. 344, at page 349,

the Court said:

> "Monopoly given to a valid trade-mark under the laws of the United States is as complete, so far as it goes, as a monopoly created by patent."

Quoting

Bourjois v. Katzel, 260 U. S. 689, 67 L. Ed. 464, in support.

II.

Claim of Respondent.

The respondent's claim for injunctive relief is based upon the Trade-Mark Act in question and upon common law principles. It is the contention of the respondent that the Trade-Mark Act projects the protection afforded by the Act to the owner of registered trade-marks throughout the entire United States in all of the channels of Interstate Commerce in advance of the sale of merchandise bearing the registered trade-mark.

In Standard Brewing Company of Baltimore v. Interboro Brewing Co., (Circuit Court of Appeals, 2nd Circuit) 229 Fed. 543, the Court said:

> "Trade-mark registered under the statutes of the United States is declared upon. The rights which a person ob-

tains by registration of a trade-mark under those statutes are co-terminus with the territory of the United States."

In other words, a registered trade-mark owner actually using the mark in interstate commerce is entitled to protection in interstate commerce against any infringer or contributing infringer where it appears that goods bearing the infringing labels move in the channels of interstate commerce. Section 16 of the Trade-Mark Act specifically gives to the registered Trade-Mark owner such protection. The language of this section condemns the reproducing, counterfeiting, copying or colorably imitating of a trade-mark, and condemns the affixing of the same to merchandise of substantially the same descriptive properties as those covered by the registered mark, and condemns reproducing, counterfeiting, copying and colorably imitating labels, signs, prints, packages, wrappers or receptacles intended to be used upon or in connection with the sale of merchandise of the same descriptive properties as those covered by the registered Trade-Mark, provided that the offending party shall use or shall have used such reproduction, counterfeit, copy or colorable imitation in commerce among the several states.

Did the Acts committed by the defendant which the Court restrained come within the condemnation of the statute? A mere reference to the facts answers the question. The Court decided that the petitioner printed labels which violated the registered trade-mark of the respondent and such offending labels were shipped in interstate commerce and were attached by defendant's customers to articles of merchandise of substantially the same descriptive properties as those covered by respondent's registered trade-mark. The undenied allegations of respondent's petition show that the merchandise of peti-

tioner's customers bearing such infringing labels were sold by such customers in the territory in which respondent was selling its merchandise bearing its registered trade-mark; in other words, were sold and used in interstate commerce. These facts show a violation by petitioner of respondent's registered trade-mark rights and entitled respondent to the injunctive relief provided for by Section 19 of the Act, and also to injunctive relief in equity without regard to the trade-mark act. The acts and conduct of the petitioner constituted a clear common law violation of respondent's legal rights and constituted unfair competition in trade.

Under the circumstances, the common law relied upon by petitioner that a Trade-Mark Act is not projected into territory in advance of trade has no application to the facts in this case, for the reason that the registered trade-mark of respondent was projected by trade into a certain territory in which the customers of the petitioner thereafter engaged in business.

In addition to committing the acts condemned by said Section 16 the petitioner was a common law contributing infringer.

Prior to the commencement of the action the respondent notified the petitioner in writing of its rights as a registered trade-mark owner and demanded of the petitioner that it desist from infringing such rights. The petitioner refused to comply with the demand and insisted upon continuing to print and publish the defendant's labels with full knowledge of defendant's rights (Record page 42).

In the case of Colman v. Crump, 40 N. Y. Sup. 61, 584, affirmed in 70 N. Y. 573, 578, the defendant was enjoined from the manufacture and sale of labels which were colorable imitation of the plaintiff's. The facts were briefly these: Messrs.

Colman were manufacturers of mustard, and, before the commencement of the suit, adopted a trade-mark of the figure of a bull's head, which it affixed to its products. The defendant engraved, printed and sold certain labels to be affixed to packages of mustard. These labels contained the word "Mustard" and the figure of a bull's head and were colorable imitations of the plaintiff's. These labels were sold to dealers in various parts of the United States. An injunction was granted and the Court, affirming the judgment of the Court below, said:

> "A party may have a property interest, that is, an exclusive right to use a name, symbol, or device to distinguish goods, manufactured and sold by him from those manufactured and sold by others. * * * This property right the Courts will protect by injunction and for its invasion the law gives compensation in damages. It is an infraction of that right to print or manufacture or put upon the market for sale and sell for use upon articles of merchandise of the same kind as those upon which it is used by the proprietor any device or symbol which, by its resemblance to the established trade-mark, will be liable to deceive the public. * * * It is not necessary to establish a guilty knowledge or fraudulent intent on the part of the wrongdoer. It is sufficient that the proprietory right of the party and its actual infringement is shown."

In

Carson v. Urg, 39 Fed. 777,

the court held that fraudulent intent will be presumed, and in

Hennessey v. Herrman, (Circuit Court, N. D. Vol.) 89 Fed. 669,

the court announced the rule that all persons in any way connected with the infringement of a trade-mark are responsible to the owner for the injury done to his rights.

The Supreme Court of Ohio applied the principle of contributing infringer to the facts in this case in which it said:

> "that all who actively and intentionally aid and abet the infringers, or, as some of the decisions classify them, contributing infringers."

The theory upon which the Supreme Court of Ohio sustained the decisions of the lower court of that state became immaterial so long as the decision is right upon the facts. Inaccuracy of statement or misconstruction of the law applicable to the facts are not grounds for reversal so long as the judgment is right and sustained by the evidence.

Williams v. Norris, 12 Wheat. 117, 6 L. Ed. 671;

McClung v. Sillimann, 6 Wheat. 598, 6 L. Ed. 340;

Atwood v. Weems, 99 U. S. 193, 25 L. Ed. 471;

Yazoo & M. Valley R. Co. v. Mullins, 249 U. S. 531, 39 Sup. Ct. Rep. 368, 63 L. Ed. 754.

III.

The Purpose of a Trade Mark.

A trade-mark is an agency or instrumentality by which its owner creates a demand for and promotes the sale of his products.

> "A man's right to the continued enjoyment of his trade reputation and the good will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which, a trade-mark is an instrumentality."

Sup. Ct. R. page 360.

Hanover Star Milling Co. v. Metcalf, 240 U. S. 423.

36 Sup. Ct. R. 357.

It stands for the genuine article, and serves to protect honest dealer and to prevent, and not promote confusion in trade.

National Cigars Stands Co. v. Frishmuth Bros. & Co. Inc., 297 Federal 348, 54.

A trade-mark confers a benefit on the ultimate consumer and the owner alike.

Wallace v. Repetti, 266 Fed. 307;

Certiorari denied Repetti v. Wallace & Co., 254 U. S. 639, 65 L. Ed. 451.

The intentional use of another's trade-mark is a fraud.

Menendez v. Holt, 128 U. S. 514, 32 L. Ed. 526.

The purpose of the "trade-mark" act was to keep the channels of commerce free from the abuses condemned by the act. This is bound to fail of accomplishment if the dealer in intrastate commerce can appropriate the registered mark. Such conduct would burden interstate commerce as effectively as if the user was actually carrying on his business in such commerce.

IV.

The Analysis of Petitioner's Authorities.

We shall proceed to a consideration of the cases relied upon by petitioner in support of the assignments of error.

Under Subdivision A of petitioner's brief, page 4, the Trade-Mark Cases, 100 U. S. 82, is quoted from at length. This case will be considered hereafter in connection with our discussion of the constitutional questions involved.

Under Subdivision B of petitioner's brief, page 5, quotation is made from the language used by Mr. Justice Holmes in Han-

over Star Milling Company v. Metcalf, 240 U. S. 402, 60 L. Ed. 713; 36 Sup. Ct. R. page 357. There is no controversy over the language quoted, but we do call attention to a further statement by Mr. Justice Pitney:

> "It should be added that, so far as appears, none of the parties here concerned has registered the trade-mark under any act of Congress or under the law of any state. Nor does it appear that in any of the states in question there exists any peculiar local rule, arising from statute or decision. Hence, the cases must be decided according to common-law principles of general application" (page 359 Sup. Ct. R.).

The case dealt entirely with a common law trade-mark and the questions of abandonment, non user in a particular market and the subject of estoppel were the only questions considered.

At this point we call attention to the fact that none of the users of the petitioner's labels in the present case had ever registered their labels or trade-marks under any State of Federal law. E. Remy Company of Ohio registered a mark in 1893, but this mark was never renewed under the trade-mark act of 1905 and therefore the owner thereof lost all rights acquired under the early registration (Record page 55).

The Respondent is doing an interstate business and by virtue of the registrations of "Home Brand," the Respondent has a monopoly in all channels of trade throughout the United States; that no one has a right to infringe the trade-mark of the respondent in violation of Chapter 16.

Under Subdivision B of its brief, page 5, petitioner quoted a sentence of Mr. Justice Pitney from the case of

> United Drug Co. v. Rectanus, 248 U. S. 90, 63 L. Ed. 141, 39 Sup. Ct. R. 48.

This was a case where a Mrs. Regis in 1877 adopted a common law trade-mark "REX". In 1898 she registered the trade-mark under the Massachusetts law, and in 1900 she registered the trade-mark under the Act of 1881 and sold her business to United Drug Co., a Massachusetts corporation. Rectanus Company was doing business in Louisville, Kentucky, and spent money in building up a trade. The case in this court turned on the question of prior use. It appears that Mrs. Rex stood by and allowed Rectanus Co., in good faith, to build up a business in Kentucky. The Rectanus Co. had only common law rights. These facts account for the remarks of Mr. Justice Pitney, quoted by the appellant.

This Court pointed out (page 51 of Supreme Court Reporter) that Mrs. Regis had no other than common law rights under the Act of 1881. This court held that a trade-mark conferred no monopoly whatever in a proper sense, but was merely a distinguishing mark, and then said:

> "It results that the adoption of a trade-mark does not, at least in the absence of some valid registration enacted for the purpose, project the right of protection in advance of the extension of trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade."

Under Subdivision C of its brief, page 7, petitioner refers to the case of

> General Baking Co. v. Gorman, 3 Fed. R. 2nd Ed. 893.

This was clearly a case involving intrastate business. In fact, the complainant, because of his misrepresentations, acquired no good will or other rights which would entitle it to protection by a Court of equity, and if there was any infringement, the complainant was the infringer. The remarks of

counsel are merely repetitions of the remarks in the Trade-Mark Cases (supra) and the Hanover Milling Company case (supra). The question now before this court was not considered.

The case of

Waldes v. International Mfg. Agency (District Court, S. D. New York), 237 Fed. 502 and 506,

referred to on page 8 of petitioner's brief, was a suit for an accounting and injunction and for cancellation of the defendant's trade-mark insofar as it conflicted with plaintiff's own. The case was one of use and the Court held that there was sufficient evidence to establish the plaintiff's use of the trade-mark prior to the defendant's use. That registration conferred no rights and limited none, and was a mere procedural advantage depending on common law ownership and gives scarcely any advantage of any sort, except under Section 16.

The Court does not go into the advantage acquired by this section.

Petitioner refers to the case of

Robertson, Commissioner of Patents v. United States ex rel Baldwin Co., 287 Fed. 943 (page 8 of brief).

In this case the Court drew a distinction between trade-mark cases and patent cases in that it held Section 9 did not entitle a trade-mark owner to bring a suit in equity after an adverse decision on such appeal as is permitted in patent cases; and held the right to a trade-mark existed independently of statute and came into existence by reason of its use and adoption. This decision was reversed

United States ex rel. Baldwin Co. v. Thomas E. Robertson, Commissioner of Patents, 265 U. S. 168, 44 Sup. Ct. R. 498, 68 L. Ed. 962.

This court holding Section 9 was applicable to trade-marks and that Congress intended to give every remedy in respect to trade-marks that is afforded in proceedings as to patents. The effect of registration was not referred to.

V.

THE TRADE-MARK ACT IS CONSTITUTIONAL.

The petitioner cites no authority and advances no argument against the constitutionality of the Trade-Mark law, but in the petition for a writ of certiorari and in the Supreme Court of Ohio the constitutionality of this legislation was questioned and we, therefore, deem it important that the matter be given consideration here.

In the case of

Rossman v. Garnier, 211 Fed. 401,

the Circuit Court of Appeals for the Eighth Circuit had before it for consideration the constitutionality of the Trade-Mark law. During the course of the opinion Judge Smith, speaking for the Court said:

> "The defendant claims the entire trade-mark law of 1905, 33 Stats. 724, is unconstitutional, and inferentially the same contention is made as to the act of 1881, 21 Stats. 502, and of 1882, 22 Stats. 298.
>
> "The first trade-mark legislation passed by Congress, was in 1870, chapter 230 of the Laws of the Forty-first Congress, and is found in 16 Stats. 198. That was entitled 'An act to revise, consolidate, and amend the statutes relating to patents and copyrights.'
>
> "Sections 77 to 84 of this act referred exclusively to trade-marks. There was nothing in the act to refute the presumption quite apparent from its title that it was enacted by Congress in the supposed exercise of its powers

under the eighth clause of the eighth section of the first article of the Constitution.

> 'Sec. 8. The Congress shall have power: • • • To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'

"In 1876, 19 Stats. 141, Congress passed an act to punish the counterfeiting of trade-mark goods and the selling or dealing in such goods. This act was for the further security or protection of trade-mark holders under the act of 1870.

"In the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, the Supreme Court held that no power to pass trade-mark legislation was conferred by the provision of the Constitution quoted and that, as the laws of 1870 and 1876 made no distinction between trade-marks used in intrastate commerce and those used in foreign commerce, interstate commerce, and commerce with the Indian tribes, both of said acts were necessarily void. This decision was rendered in October, 1879, and it was in conformity with what was supposed to have been laid down by the Supreme Court in those cases that all the subsequent legislation upon the subject has been enacted. It is probably true that the constitutionality of the more recent legislation has never been expressly passed upon by the Supreme Court of the United States, but that legislation has now stood for more than 30 years. It has been enforced by the United States Supreme Court and all the other courts of the United States and we see no reason to suppose the law is not sustainable under clause 3 of section 8 of article 1 of the Constitution:

> 'The Congress shall have power: • • • To regulate commerce with foriegn nations, and among the several states, and with the Indian tribes.'

"In Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 675, 21 Sup. Ct. 270, 273 (45 L. Ed. 365), this Court said:

> 'The term (trade-mark) has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others.'
>
> "Surely if this be a correct definition of a trade-mark regulations for the registering and protection of them in connection with commerce, interstate or foreign, or with the Indian tribes, is legitimate legislation in connection with the regulation of such commerce. Surely if such marks are distinctive badges of authenticity it is as much a part of the regulation of interstate commerce to regulate them as are the branding features under the pure food law.
>
> "This court cannot therefore hold that such legislation is unconstitutional en bloc."

The Supreme Court of Ohio in the present case considered and passed upon the constitutionality of the trade-mark law. After careful consideration the constitutionality of the Act was sustained (Record pages 16-17).

Congress has under the commerce clause enacted a number of comprehensive statutes for the protection of interstate commerce. For instance, the Federal Trade Commission Act, 38 Stats. 717, was designed to prevent unfair competition in commerce. This law was aimed at abuses in trade and was designed to give protection to those lawfully engaged in interstate commerce against unfair competition. Injunctive relief to prevent unfair competition may be granted under that Act.

> Juvenile Shoe Co. v. Federal Trade Commission, 289 Fed. 57.

The use of false and misleading labels and advertisements may be stopped as unfair methods of competition.

Royal Baking Powder Co. v. Federal Trade Commission, 281 Fed. 744;

Proctor Gamble Co. v. Federal Trade Commission, 11 Fed. (2nd Series) 47.

It is apparent that there is an analogy between the Federal Trade Commission Act and the Trade-Mark law, as both were designed to protect the honest dealer and condemn and punish unfair competition. The constitutionality of the Federal Trade Commission Act has been sustained.

National Harness Mfg. Ass'n. v. Federal Trade Comm., 268 Fed. 705;

United States v. Basic Products Co., 260 Fed. 472;

Federal Trade Commission v. P. Lanllord Co., 283 Fed. 999;

Affirmed in 264 U. S. 298, 68 L. Ed. 696;

Sears-Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307;

Chamber of Commerce of Minneapolis v. Federal Trade Commission, 280 Fed. 45.

As illustrative of the authority of Congress over interstate commerce attention is called to

United States v. Ferger, 250 U. S. 199, 63 L. Ed. 937,

the Court said:

> "Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills, which, in and of themselves, involved the potentiality of fraud so far-reaching, and all embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate."

Congress under the commerce clause enacted the Pure Food and Drug Act, 34 Stats. 768. This law has been sustained as a legitimate exercise of the power to regulate interstate commerce.

Weeks v. United States, 245 U. S. 620, 62 L. Ed. 513;
McDermott v. Wisconsin, 228 U. S. 115, 57 L. Ed. 754.

The purpose of the Act is to advise purchasers of what they are buying and that the article purchased is what it purports to be.

U. S. v. Antikamnia Chemical Co., 234 U. S. 654, 58 L. Ed. 419.

Misbranding of merchandise in Commerce is condemned by the Act.

Savage v. Jones, 225 U. S. 501, 56 L. Ed. 1182.

It would seem on principle that, if Congress has authority to legislate under the commerce clause on the misbranding of food and drugs, that it would have like authority to prevent by legislation the use of a registered trade-mark by any one than the owner thereof in Interstate Commerce. A fraud and deception results in the latter case as much as in the former.

The powers conferred upon Congress to regulate commerce, means not only to regulate but prohibit. An embargo may be placed upon commerce prohibited by law.

Champion v. Ames, 188 U. S. 321, 47 L. Ed. 492 (The lottery case).

In the above case the Supreme Court sustained an Act of Congress preventing the transportation of lottery tickets in Interstate Commerce.

The power of Congress to regulate commerce is not to be tested by the intrinsic interest of commerce in the particular subject dealt with instead of by the relation of that subject to commerce and its effect upon it. The power to regulate commerce includes the power to deal with obstructions to that commerce.

Re Debs, 158 U. S. 564, 39 L. Ed. 1092;

First National Bank v. Fellows, 244 U. S. 416, 61 L. Ed. 1233;

United States v. Ferger, 250 U. S. 199; 63 L. Ed. 936.

The only decision of this Court passing upon the constitutionality of trade-mark legislation which has come to our attention is the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550. That case involved the Trade-Mark Act of 1870 and a penal statute enacted in 1876.

With reference to the authority of Congress over the subject of Trade-Marks the Court, speaking through Mr. Justice Miller, said:

> "The question, therefore, whether the trade-mark bears such a relation to Commerce in general terms as to bring it within Congressional control, when used or applied to the classes of Commerce which fall within that control, is one which, in the present case, we propose to leave undecided. We adopt this course because when this court is called on in the course of the administration of the law to consider whether an act of Congress, or any other department of the Government is within the constitutional authority of that department, a due respect for a co-ordinate branch of the Government, requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty."

And further,

> "In what we have here said we wish to be understood as leaving the whole question of the treaty making power of the general government over trade-marks, and of the duty of Congress to pass any laws necessary to carry such treaties into effect, wholly untouched."

It is apparent from the language used that this Court did not pass upon the power of Congress to legislate on the subject of trade-marks under the commerce clause of the constitution.

The authority of Congress over interstate commerce was commended upon by Mr. Justice Hughes in the case of

> Houston East & West Texas Ry. Co., et al. v. United States, et al, 234 U. S. 342, 58 L. Ed. 1341,

as follows:

> "It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation, and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control * * *.
>
> "Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' * * *; to adopt measures 'to promote its

growth and insure its safety' * * *; 'to foster, protect, control, and restrain'."

CONCLUSION.

It is respectfully submitted that the rights of the respondent in the Trade-Mark "Home Brand" were projected by the Act of 1905 into the channels of Interstate Commerce and that the petitioner by printing and publishing infringing labels, which were attached by its customers to their products and sold by such customers in the territory in which respondent was engaged in business, violated the registered trade-mark rights of respondent, and that the decision of the Supreme Court of Ohio in this case should be affirmed.

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APPENDIX.

The Trade Mark Act of 1905.

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